Alaska Workers' Compensation Appeals Commission

University of Alaska Fairbanks, and
University of Alaska Statewide Office of Risk Management,
Appellants,

vs.

Norman E. Hogenson,
Appellee.

Final Decision and Order
Decision No. 074 February 28, 2008

AWCAC Appeal No. 07-023
AWCB Decision No. 07-0118
AWCB Case No. 199807735

Appeal from Alaska Workers' Compensation Board Decision No. 07-0118, issued by the northern panel at Fairbanks on May 9, 2007, William Walters, Chair, Debra G. Norum, Member for Industry, Damian Thomas, Member for Labor.

Appearances: Constance Cates Ringstad, McConahy, Zimmerman & Wallace, for appellants University of Alaska Fairbanks, and University of Alaska Statewide Office of Risk Management. Norman E. Hogenson, pro se, appellee.

This decision has been edited to conform to technical standards for publication.

Commissioners: John Giuchici, Philip Ulmer, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

This is an appeal of a decision denying a petition to dismiss one of several claims as time-barred under AS 23.30.110(c). We conclude the board correctly barred the earlier claims; but a request for benefits made in the 2001 written claim and time-barred may not be revived by filing a later claim for the same benefits based on the same injury. However, to the extent different benefits are requested in a later claim, the expiration of the time-bar in the earlier claim does not affect the later claim. We conclude that the board in this case properly permitted the employee's claim for benefits based on the claimant's allegation of physician interference to survive. We note that the viability of the interference claim under the workers' compensation act was not before the board. We AFFIRM the board's decision.

1. Factual background.

The commission does not make findings of fact. It provides a summary of facts for the purpose of putting the legal issues presented by this appeal in context. We cite to the record as necessary to assure the parties that we have not departed from the record. Since this appeal primarily concerns questions of law and procedure, we describe the proceedings before the board in detail.

Norman Hogenson struck his head on a 2-3/4 inch conduit suspended from a low ceiling in the paint shop of the University of Alaska Fairbanks (UAF) on April 16, 1998, and reported that he had injured his neck.[1] He was diagnosed as having symptomatic cervical spondylosis and extensive stenosis.[2] Hogenson was paid temporary total disability compensation from April 29, 1998, to November 6, 1998, and from February 26, 1999 through April 13, 2000.[3] On April 14, 2000, UAF began paying permanent partial disability compensation in periodic amounts, stating that Hogenson's attending physician had determined he was medically stable, and a rating of permanent impairment was expected.[4]

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[1] R. 0001. This was Hogenson's written notice of injury. The notice of injury, although sometimes informally called a "claim," is not the claim for compensation that triggers the requirement for an answer, 8 AAC 45.050(c), and controversion under AS 23.30.110(c). A notice of injury may also trigger a requirement to file a notice of controversion under AS 23.30.155. As we noted previously, the Alaska workers' compensation system "is sometimes called a 'voluntary pay' system, because payment is required to be made 'voluntarily' without an award (order) from the board. However, since payment is required by law, payment is voluntary only in the sense that it is not made as a result of a board order." *S&W Radiator Shop v. Flynn,* Alaska Workers' Comp. App. Comm'n Dec. No. 016, 20 n.94, 2006 WL 3325408 *8 (August 4, 2006). A report of injury and a written claim may trigger overlapping and similar legal obligations to file a notice of controversion.

[2] R. 0232.

[3] R. 0015.

[4] R. 0015-16. Temporary total disability benefits may not be paid after the date of medical stability. AS 23.30.185. Compensation for permanent partial impairment is payable in a single lump sum, except as provided in AS 23.30.041, which covers reemployment benefits. AS 23.30.190(a). Hogenson had been referred for a reemployment benefits eligibility evaluation, R. 0850, and was in the eligibility

2. Board proceedings.

On May 8, 2000, Hogenson filed his first written claim for benefits.[5] He asked for a penalty on a late payment and, without asking for an adjustment to his wage basis, checked the box stating, "At the time of injury, . . . (i) Employee was injured on or after September 4, 1995, is permanently totally disabled, and wages calculated by Employer don't fairly reflect earnings during the period of disability."[6] In August 2000, Robert Rehbock, an Anchorage attorney, entered an appearance for Hogenson.[7] On August 24, 2000, UAF filed a controversion on a board-approved form of the "permanent partial impairment rating . . . received August 1, 2000," on the grounds that it had been improperly calculated.[8] On October 16, 2000, Mr. Rehbock filed a written claim on Hogenson's behalf for permanent total disability, permanent partial impairment, a penalty and attorney fees.[9] The nature of the injury was listed as "cervical and bilateral carpal tunnel."[10] The reason for filing the application was "Compensation Report dated 09/22/00 terminating benefits, 8/21/00 controversion

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evaluation process when determined to be medically stable. R. 0879. Although he was determined to be eligible for reemployment benefits, R. 0903, he declined them on September 6, 2000. R. 0905.

[5] R. 0047-48.

[6] R. 0048. Hogenson did not check the box 24-h marked "compensation rate adjustment," so it is difficult to know what he intended.

[7] R. 0049-50.

[8] R. 0021.

[9] R. 0067-68. This claim included a request for "ongoing" medical benefits, Review of the Reemployment Benefits Decision on eligibility. R. 0068. The reemployment benefits administrator determined Hogenson *was eligible* for reemployment benefits on August 31, 2000, six weeks before the claim was filed. R.0903-4. Hogenson refused the benefits on September 6, 2000. R. 0905. Mr. Rehbock also filed a Petition for a Second Independent Medical Examination, R. 0052-53.

[10] R. 0067.

notice, additional carpal tunnel impairments, and .041(k) benefits have been wrongly suspended."[11]

UAF timely answered the claim October 24, 2000,[12] but did not file a controversion again until April 9, 2001, when it again controverted permanent partial impairment benefits.[13] Meanwhile, the parties attended a prehearing conference on December 7, 2000.[14] The issues listed included:

> EE's 10/3/00 claim:
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> PTD 4/29/98
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> PPI
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> ongoing meds
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> eligibility evaluation for vocational rehabilitation
>
> penalty/interest
>
> atty fees/costs
>
> Petition for SIME
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> Petition to strike ER's request for cross-exam
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> Affidavit of readiness for hearing filed on the 11/2/00 Petition to Strike[15]

The prehearing conference officer noted that Hogenson was refusing to attend an employer's medical examination by John Joosse, M.D. because Hogenson had already attended an examination by another employer physician.[16] UAF filed a petition to terminate benefits for refusal to attend an examination by the employer's physician, and requested payment of physician fees for the three examinations.[17] The parties agreed to a board hearing on Hogenson's petitions to take place in February 2001.[18] Before the hearing, the parties entered into an agreement that resolved two of the three petitions: UAF recognized Roy Pierson, M.D., as Hogenson's attending physician

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11 *Id.*

12 R. 0056-57.

13 R. 0027.

14 R. 0813.

15 *Id.*

16 R. 0813.

17 R. 0076-79.

18 R. 0817.

and Hogenson agreed to an evaluation by John Joosse, M.D.[19] The third issue resulted in an interlocutory board decision.[20]

On April 9, 2001, UAF filed another controversion, incorporating the prior controversion, but adding that the SIME rating was defective.[21] On June 22, 2001, Mr. Rehbock withdrew as Hogenson's attorney.[22] At hearing, Hogenson described the basis of his disagreement with Mr. Rehbock:

> And the university wanted me to go see this Dr. Joosse. And that was their doctor and had a right to have an exam. Well, I protested to Rehbock, and he – he said, well, you're going to turn this into a train wreck, which it did. But I wasn't going to go see a doctor that didn't have my best interests at heart. And so Rehbock withdrew.[23]

On June 19, 2001, Hogenson filed a claim form himself.[24] He stated that the "University of Alaska Fairbanks, Risk Management has stoped [sic] payment on my claim! I am requesting immediate action on this claim! And also the 25% penalty for being late!"[25] On this claim form, he requested the following benefits: temporary total disability from August 21, 2000 and continuing; permanent partial impairment; interest, attorney's fees and costs.[26] The claim was answered and controverted.[27] The controversion listed the benefits controverted as: "PPI, TTD, PTD, eligibility review, penalty, interest or fees."[28]

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19 R. 0098-99.

20 R. 0142-51.

21 R. 0027.

22 R. 0154-55.

23 Hrg Tr. 20:12-19.

24 R. 0157-58.

25 R. 0157.

26 R. 0158. Hogenson also checked two boxes concerned with the basis for a rate adjustment, without requesting a rate adjustment.

27 R. 0160-61.

28 R. 0161.

James Hackett, a Fairbanks attorney, entered an appearance for Hogenson in August 2001[29] and withdrew in December 2001.[30] However, while Mr. Hackett represented Hogenson, the parties agreed to a Second Independent Medical Examination (SIME).[31] The SIME report did not adhere to board guidelines, and the parties met again to arrange for follow-up questions to the SIME physician in December 2001.[32] The SIME rating was also controverted.[33]

After Mr. Hackett withdrew, no further prehearing conferences were scheduled until Hogenson filed another claim form on June 25, 2002. This claim form contained the following statement:

> At this time 6/24/02: I am asking that the Permanent Partial Rating of 6/22/00 by Dr. Pierson be removed! And my by [sic] weekly benefits be reinstated; plus the 25% penalty! The reason; My employer, UAF risk management use there [sic] Dr., Dr. John Joosse, to influence my Doctor's in a negative way.[34]

On the reverse of the form, Hogenson checked the box for "Temporary Total Disability" and wrote below, "from June 22, 2000 through continuing."[35] This claim was answered,[36] but no further controversion was filed until November 6, 2002.[37] This controversion was limited to permanent partial disability benefits, and stated: "Prior controversions addressing PPI are adopted and incorporated herein."[38]

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29 R. 0162-63.

30 R. 0164.

31 R. 0822-24.

32 R. 0827.

33 R. 0031. Another controversion was filed on April 15, 2002, of travel expenses outside of Alaska. The controversion specifically referred to Dr. Joosse's opinion. R. 0035.

34 R. 0168.

35 R. 0169.

36 R. 0171.

37 R. 0042.

38 *Id.*

At a prehearing conference on August 19, 2002, the issues were limited to the June 25, 2002, claim, asserting undue influence by Dr. Joosse and demanding reinstatement of temporary total disability compensation.[39] Hogenson stated he was trying to find an attorney to assist him.[40] A prehearing conference was held September 23, 2002.[41] The prehearing officer noted under the heading "Defenses": "Answer and controversion to claim. Denials based on EIME report and opinions of treating physicians."[42] The prehearing officer also noted that although UAF's attorney sent draft questions for the SIME physician to Mr. Hackett to approve, the questions were never forwarded to the physician because of Mr. Hackett's withdrawal.[43] UAF's attorney agreed to give them to the prehearing officer, who would send them to the SIME physician.[44] The prehearing officer also noted she gave a copy of an affidavit of readiness for hearing form to Hogenson, as well as a list of claimant attorneys.[45]

On February 14, 2003, Hogenson filed an incomplete affidavit of readiness to proceed.[46] It was returned to him with a letter stating:

> Your affidavit of readiness for hearing, received in this office on 2/14/03, is being returned for the following reason(s):
>
> Box 12 indicates you are requesting a hearing for an application dated February 14, 2003. Our records indicate the last application (claim) you filed was on 6/25/02.
>
> The affidavit requires that your signature be notarized. (Boxes 17, 18, 19)

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39 R. 0832.

40 *Id.*

41 R. 0838.

42 *Id.*

43 R. 0838.

44 *Id.*

45 *Id.*

46 R. 0843.

> The affidavit requires that you serve a copy on the parties. You must mail a copy to Mr. McConahy and to the University. (Boxes 20, 21)
>
> You must sign and date the affidavit. (Boxes 22, 23)
>
> Your revised affidavit of readiness for hearing must be re-served on all parties. Box 23 must reflect the new service date.[47]

Nothing further occurred until Hogenson filed an affidavit of readiness for hearing on January 24, 2007, referring to the "10/02/2000, 5/8/2000, 6/25/2002" claims.[48] This controversion was followed by UAF's request that the board dismiss the claims for Hogenson's failure to request a hearing within two years of controversion under AS 23.30.110(c).[49] The board heard the request as a petition to dismiss the claims on April 12, 2007.[50]

The board found that Hogenson filed claims on October 3, 2000, June 19, 2002, and June 25, 2002.[51] It described the benefits that Hogenson sought in each claim, and the pertinent notice of controversion filed afterwards.[52] The board found that Hogenson first requested a hearing on his 2000 and 2001 claims when he filed an Affidavit of Readiness for Hearing on January 24, 2007, well beyond the two years required by AS 23.30.110(c).[53] The board concluded these claims were barred by AS 23.30.110(c).[54]

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[47] R. 0841.

[48] R. 0225. This is a copy of a faxed document; the original of Hogenson's affidavit could not be located in the board's record.

[49] R. 0180. An original petition form, if filed by UAF, could not be located in the board's record.

[50] *Norman E. Hogenson v. University of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 07-0118, 1 (May 9, 2007).

[51] *Id.* at 6.

[52] *Id.* at 8.

[53] *Id.*

[54] *Id.*

However, the board found that the employee was asserting an "essentially different, and new, basis for claiming TTD benefits in the Workers' Compensation Claim of June 25, 2002."[55] The June 25, 2002, claim had not been controverted "on a board-prescribed controversion notice."[56] Therefore, the board found, the two-year time limit had not yet begun to run against the June 25, 2002, claim.[57] It ordered that the "June 25, 2002, claim for TTD benefits from June 22, 2002 and continuing, is not barred under AS 23.30.110(c)."[58]

3. Standard of review.

The commission is directed by the Alaska State Legislature to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[59] The commission is required to exercise its independent judgment on questions of law and procedure within the scope of the Alaska Workers' Compensation Act.[60] If we must exercise our independent judgment to interpret the Act, where it has not been addressed by the Alaska Supreme Court, we draw upon the specialized knowledge and experience of this commission in workers' compensation,[61] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[62]

4. Discussion.

This appeal asks us to decide whether a claimant's June 2002 claim "merged" with his 2001 claim, and, if it did, whether the controversion of the 2001 claim serves to start the time-bar in AS 23.30.110(c) against a claim for the same benefits in the 2002

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55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 9.

59 AS 23.30.128(b). The board made no determination of the credibility of the witnesses before it, to which the commission is bound. AS 23.30.128(a).

60 AS 23.30.128(b).

61 *See Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

62 *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979).

claim. Taking into account the Supreme Court's decision in *Bailey v. Texas Instruments, Inc.*,[63] and our previous decisions on this subject, our view is that the balance the Alaska workers' compensation system seeks to strike between speed and efficiency on the one hand,[64] and the legislative mandate to fairly adjudicate claims on their merits on the other,[65] is preserved by providing a fair and liberal opportunity to file claims coupled with a requirement that those claims be responsibly prosecuted in a timely manner. We conclude that when a claim for benefits expires under AS 23.30.110(c) and is dismissed, a later-filed claim for the same benefits for the same injury may not revive the expired claim, but that a later-filed claim for the same benefits on a *different nature of injury previously unknown* to the employee, or *for a different benefit* from the same injury, is not extinguished with the earlier claim.

a. A partial controversion of a written claim will not suffice to time-bar uncontroverted benefits.

AS 23.30.110(c) provides in pertinent part that

> Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

The appellant argues it controverted Hogenson's June 2002 claim in November 2002. However, that controversion stated:

15. Specific Benefits Controverted (Denied)	14. Reason – Specific Benefits Controverted (Denied)
SIME PPI RATING	1) Prior controversions addressing PPI are adopted and incorporated herein. 2) SIME used incurred edition of AMA Guides. 3) SIME failed to back out prior rating. 4) Contrary to finding of IME's.

[63] 111 P.3d 321 (Alaska 2005).

[64] AS 23.30.001(1).

[65] AS 23.30.001(2).

Hogenson's June 2002 claim was handwritten; he did not specifically claim permanent partial impairment compensation in accord with the SIME's rating. He wrote that

> At this time 6/24/02: I am asking that the Permanent Partial Rating of 6/22/00 by Dr. Pierson be removed! And my by [sic] weekly benefits be reinstated; plus the 25% penalty! The reason: My employer, UAF risk management use there [sic] Dr., Dr. John Joosse, to influence my Doctor's in a negative way.[66]

On the form's reverse, he checked a box for temporary total disability compensation from June 22, 2000 and continuing, presumably until he is no longer eligible.

Hogenson's June 2002 claim does not ask for *additional* permanent partial impairment compensation; it asks that the "permanent partial rating . . . be removed" and temporary total disability compensation be reinstated. At the prehearing conference in September 2002, the parties discussed the SIME physician's report and the prehearing officer noted that she would "follow-up with Dr. Bloom regarding the PPI *and date of medical stability* issues."[67] The date of medical stability is the date a person's entitlement to temporary total disability compensation ceases under AS 23.30.185. Thus, when the SIME physician was asked for the date of medical stability, he was asked to address a dispute material to the June 2002 claim for reinstatement of temporary benefits – that is, when temporary total disability compensation should be terminated.

Unfortunately, the SIME physician did not squarely address the issue of medical stability. If he had, a controversion of the SIME rating (including the medical stability date) might be regarded as a controversion of temporary total disability benefits up to that date. However, without a clearer indication of the relationship between the claim for reinstatement of temporary disability compensation and the SIME PPI rating, UAF's controversion of the SIME PPI rating could not put Hogenson on fair notice that the benefit he claimed (removal of Dr. Pierson's impairment rating and reinstatement of temporary total disability benefits because he was not medically stable) was

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66 R. 0168.

67 R. 0838 (emphasis added).

controverted and for what reason.[68] Moreover, the November controversion addressed only part of Hogenson's claim. Hogenson asked that Dr. Pierson's rating be removed *because* Dr. Joosse had influenced Dr. Pierson in a negative way. He also claimed that he was entitled to a 25% penalty for the same reason. The November 2002 controversion did not address this claim.

Although UAF did issue a controversion following the 2002 claim related to the issues raised by the claimant, we conclude that the board had substantial evidence to support its finding that the employer did not issue a controversion of the June 25, 2002, claim for temporary total disability compensation.

b. A later claim for the same benefits previously claimed and controverted will not revive an expired claim.

UAF argues that the board properly found that Hogenson's 2001 claim expired by operation of the time-bar in AS 23.30.110(c). It argues that Hogenson's 2002 claim is virtually the same as the 2001 claim, requesting "TTD benefits over substantially the same period of time for the same injury suffered in the same accident."[69] When Hogenson brought his 2001 claim, UAF argues, "he could have requested the restart of continuing TTD from June 22, 2000, rather than August 21, 2000, or from any other

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[68] 8 AAC 45.182 requires employers to use form 07-6105 to controvert a claim, and declares that "[i]f the law does not support the controversion or if evidence to support the controversion was not in the party's possession, the board will invalidate the controversion." 8 AAC 45.182(a), (b). The regulation does not prescribe certain words that an employer must use; but, the purpose of a post-claim controversion is *notice* – to notify the claimant what claimed benefits are contested and why. As the Supreme Court said in a related context, "While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so that they can prepare their cases: '[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings.'" *Groom v. State, Dep't of Transp.*, 169 P.3d 626, 635 (Alaska 2007) (quoting *North State Tel. Co. v. Alaska Pub. Util. Comm'n*, 522 P.2d 711, 714 (Alaska 1974)). The court also held that "defects in administrative notice may be cured by other evidence that the parties knew what the proceedings would entail," 169 P.3d at 635; for that reason, we closely examine the prehearing officer's summary.

[69] Appellant's Br. 23-24.

date after TTD was terminated."[70] Therefore, the 2002 claim should have been barred as well, because it was not a new claim.

At hearing before the board, Hogenson admitted that he knew that

> in a legal process . . . if there's something that is ongoing, there's paperwork, that there's communication, if there's contact, if there's discussion, . . . I didn't file it in a timely matter. There's nothing really to remind me. I know that Workmen's Comp Board sent me a letter, . . . saying you have two years.[71]

He complained that he did not have an attorney, and said, "I'm positive that . . . the workmen's comp people did all the right things, but there has been no provision for anybody to speak for me."[72] In oral argument to the commission, Hogenson again presented his complaint that he was unrepresented.

We begin with the board's dismissal of the 2001 claim under AS 23.30.110(c). The 2001 claim was filed June 19, 2001, for the following benefits: temporary total disability from August 21, 2000 and continuing;[73] permanent partial impairment; interest, attorney's fees and costs.[74] The board served it on the employer on July 6, 2001, according to the board's service stamp at the top of the page.[75] UAF filed a comprehensive notice of controversion on July 24, 2001, well within 21 days of notice of the claim.[76] To avoid the time-bar on this claim, Hogenson had to file a request for hearing before July 25, 2003. The board found that Hogenson failed to file a request for hearing within the two-year time limit and the claim was denied by operation of

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[70] Appellant's Br. 24.

[71] Hrg Tr. 31:9-17.

[72] Hrg Tr. 32:18-20.

[73] The term "and continuing" is often used by the board to indicate "continuing periodically to a future date to be established by the evidence"; it does not mean "continuing forever into the future."

[74] R. 0158. Hogenson also checked two boxes concerned with the basis for a rate adjustment, without requesting a rate adjustment.

[75] R. 0157. See AS 23.30.110(b).

[76] R. 0161. See AS 23.30.155(d).

AS 23.30.110(c). We agree that there is substantial evidence in light of the whole record to support the board's finding that Hogenson failed to file a request for hearing within two years of July 24, 2001. We agree with the board's conclusion that the June 19, 2001 claim was denied by operation of AS 23.30.110(c).

UAF argues that the June 25, 2002, claim was also dismissed because it essentially duplicates the claim filed June 19, 2001. The question not addressed by UAF is whether a dismissal under AS 23.30.110(c) has the fully preclusive effect of a "final judgment on the merits." Based on the Supreme Court's decision in *Bailey v. Texas Instruments, Inc.*, we hold that denial and dismissal of a particular claim under AS 23.30.110(c), after the dilatory party is given notice and opportunity to present evidence and argue against dismissal of the claim, has the effect of dismissal with prejudice, and precludes raising a later claim for the *same* benefit, arising from the *same* injury, against the *same* employer, based on the *same* theory (nature) of injury.[77]

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[77] *Bailey*, 111 P.3d at 324-25. The general rule is that res judicata applies to bar relitigation of later claims between the same parties on the claims that could have been brought in the first proceeding once judgment on the merits is entered. The common law of res judicata states:

> Res judicata will apply to bar a subsequent action where: "(1) a court of competent jurisdiction, (2) has rendered a final judgment on the merits, and (3) the same cause of action and same parties or their privies were involved in both suits." The doctrine implements the "generally recognized public policy" that there must be some final and conclusive end to litigation.

Weber v. State, 166 P.3d 899, 901-02 (Alaska 2007); *Blake v. Gilbert,* 702 P.2d 631, 634-35 (Alaska 1985), *overruled on other grounds by Bibo v. Jeffrey's Restaurant*, 770 P.2d 290 (Alaska 1989). While res judicata is not applied as rigidly in workers' compensation cases, it nonetheless is applicable to workers' compensation proceedings. *Robertson v. American Mechanical, Inc.,* 54 P.3d 777, 779-80 (Alaska 2002).

A first comparison to Alaska Rule of Civil Procedure 41(e), instead of Alaska Rule of Civil Procedure 41(b), suggests that AS 23.30.110(c) is a harsh sanction. However, *unlike plaintiffs in actions at law,* a workers' compensation claimant is not restricted to filing a single, unified claim for *all* compensation and damages he or she is owed, now and in the future, as a result of the injury, nor need he or she put them to trial all at once, hazarding the future on one jury's estimation of the evidence. Over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical

The Alaska Workers' Compensation Act liberally allows an injured employee to file claims and litigate issues as they ripen, rather than file a unified claim for each injury that must later be reopened.[78] Parties may freely amend claims in the course of prehearing conferences.[79] Within one year, a decision denying a claim may be reversed or modified, even on the board's own motion.[80] However, at some point, an end of adjudication must be reached, whether by decision on the merits after hearing, by settlement, or by operation of law.

We have previously discussed that AS 23.30.110(c) has no provision to excuse a claimant who fails to request a hearing.[81] Moreover, there is no savings statute in the Alaska Workers' Compensation Act equivalent to AS 09.10.240.[82] The Supreme Court

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treatments occur. *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 440 (Alaska 2000). Dismissal and preclusion of relitigation of a claim because the claimant has not done the one thing required to preserve the claim, *Huston v. Coho Electric*, 923 P.2d 818, 820 (Alaska 1996), is not so harsh in light of the availability of other future claims arising out of the same injury.

[78] *Egemo*, 998 P.2d at 440; *see also Sourdough Express, Inc., v. Barron,* Alaska Workers' Comp. App. Comm'n Dec. No. 069 (Feb. 7, 2008).

[79] 8 AAC 45.050(e). Amendments to claims relate back to the date of the original claim. 8 AAC 45.050(e).

[80] AS 23.30.130.

[81] *Kim v. Alyeska Seafoods, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 042, 15 (May 22, 2007), *appeal filed,* No. S12754; *Morgan v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 035, 17-18 (Feb. 28, 2007); *Bohlmann v. Alaska Constr. & Engineering,* Alaska Workers' Comp. App. Comm'n Dec. No. 023, 12-14 (Dec. 8, 2006) *appeal filed,* No. S12553; *Alaska Airlines v. Nickerson,* Alaska Workers' Comp. App. Comm'n Dec. No. 021, 11-13 (Oct. 19, 2006).

[82] AS 09.10.240 provides in part:

> If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff or, if the plaintiff dies and the cause of action in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the

has stated that AS 23.30.110(c) is not a general "no progress rule."[83] It is like a statute of limitations in its effect on the claim dismissed by its operation, but it does not terminate all rights based on a given injury.[84] "[I]t does not prevent the employee from applying for *different* benefits, or raising *other* claims, based upon a given injury."[85] Finally, although the *effect* is one of dismissal of a claim, the Legislature wrote, "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is *denied*."[86] The use of the word "denied" instead of "dismissed" tells us that the Legislature intended that failure to file a request for hearing within two years should have the effect of a decision denying the claim, instead of a "dismissal without prejudice," which would allow the employee to refile for the same benefits, based on the same injury, against the same employer.[87]

Nonetheless, the disadvantages suffered by self-represented claimants in such cases, which we have noted previously,[88] and the demands of due process require that

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time limited, are available against the action when brought under this provision.

[83] *Wagner v. Stuckagain Heights*, 926 P.2d 456, 459 n.7 (Alaska 1996).

[84] *Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 912 n.4 (Alaska 1996). We note that a claim that is dismissed for failure to file within the statute of limitations functionally precludes the same claim being filed again in the same tribunal, although, depending on the applicable statutes of limitation, it may not preclude filing the same claim in a different tribunal.

[85] *Id.* (emphasis added). The Supreme Court would not need to note that dismissal under AS 23.30.110(c) did not prevent the filing of *different* claims if the *same* claim could be filed later. *See also Tolbert v. Alascom, Inc.*, 973 P.2d 603, 612 (Alaska 1999 (holding that claims relating to the employee's tendinitis were not barred by res judicata because tendinitis is a "temporary (albeit recurring) condition").

[86] AS 23.30.110(c) (emphasis added).

[87] *See also DeNardo v. Barrans*, 59 P.3d 266, 269 (Alaska 2002) (discussing preclusive effect of "punitive dismissal" under Federal R. Civ. Pro. 41(b) for failure to prosecute action, applied against plaintiff in parallel state court action).

[88] *Kuukpik Arctic Catering, L.L.C., v. Harig*, Alaska Workers' Comp. App. Comm'n Dec. No. 038, 11 (April 27, 2007).

a dismissal under AS 23.30.110(c) is not with prejudice against an unrepresented claimant unless the claimant has had a fair opportunity in a hearing to respond to the petition to dismiss the claim and to present evidence to the board as to why his or her claim should not be dismissed, either for some legal excuse,[89] or because the evidence does not support operation of the statute against the claim. We recognize that this places a greater burden on the board, but in light of the finality of the effect of dismissal of a claim and the absence of board discretion in applying AS 23.30.110(c), we are reluctant to endorse a process that does not provide the unrepresented claimant with the opportunity to respond verbally to the evidence in favor of dismissal.

Hogenson, however, had such an opportunity. The dismissal of Hogenson's June 19, 2001, claim operates to bar a later claim against the same employer, for the same benefits, resulting from the same injury. If an earlier claim is denied and dismissed by board order, and a second claim for the same benefit is filed within the statute of limitations,[90] the second claim cannot revive the denied claim. Thus, to the extent that the 2002 claim duplicates a request for benefits denied in the 2001 claim, the 2002 claim is also barred. However, the 2002 claim also requests different benefits: a 25% penalty and temporary total disability compensation from June 22, 2000 and continuing (instead of from August 21, 2000 and continuing).[91] We conclude that these claims, to the extent not duplicated, are not barred by the dismissal of the 2001 claim.

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[89] *Tonoian v. Pinkerton Security*, Alaska Workers' Comp. App. Comm'n Dec. No. 029, 11 (Jan. 30, 2007).

[90] Although the board did not make note of this fact, and the employer did not address it, Hogenson's June 25, 2002, claim was filed within two years of the last payment of compensation on July 6, 2000, R. 0040. AS 23.30.105(a).

[91] Since the claim for temporary total disability compensation from August 21, 2000 "and continuing" into a point in future to be proven is denied, a claim for the same period of temporary total disability compensation is precluded by denial of the 2000 claim. We construe the 2000 claim to be for the period from August 21, 2000 to the first date of medical stability thereafter. This leaves only about two months of temporary total disability compensation (June 22, 2000 to August 21, 2000) at issue in the 2002 claim.

5. The board properly permitted the employee to proceed on his claim based on an alternate theory of injury, without considering whether the claim was viable under the act.

UAF argues that the Supreme Court's decision in *Robertson v. American Mechanical, Inc.,*[92] is controlling authority that precludes Hogenson's claim because Hogenson's allegation of Dr. Joosse's negative influence does not change the "core set of facts" that Hogenson needed to prove to "restart" temporary total disability compensation.[93] Hogenson argues that he did not know until August 7, 2007, how Dr. Joosse had interfered,[94] although he testified that the origins of Dr. Joosse's animus toward him dates to an incident in 1987 at a shooting range, when Dr. Joosse and his two sons came to the range with cameras.[95] Hogenson thought this "was extremely unusual because people that are into guns and hunting don't like it. You know, we like to be private."[96] This incident, he testified, "is kind of what started to derail everything."[97]

We agree that Hogenson's claim for removal of the impairment rating by his own physician is based on an injury of a different nature, and is for another form of relief, than his claim for temporary total disability compensation based on a lack of medical stability from June 19, 2000 to some point in the future to be determined. Hogenson claims that *his own physician's opinion* is invalid owing to interference by the employer's medical evaluator; that is, that Dr. Joosse influenced or persuaded Dr. Pierson to give a different opinion than would have been given had Dr. Pierson's

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92 54 P.3d 777, 780 (Alaska 2002) (holding claims based on the same injury and the same "core set of facts" should be brought together, even when grounded in different theories; adverse judgment in a suit in which some of the claims were brought extinguished all claims that ought to have been brought together.).

93 Appellant's Br. 24.

94 Appellee's Br. 17.

95 Hrg Tr. 14:16-15:1.

96 Hrg Tr. 14:21-23.

97 Hrg Tr. 14:16-17.

medical judgment been exercised outside the shadow of Dr. Joosse's influence.[98] In our view this is not the same "core set of facts," for although Dr. Pierson's opinion was given in the course of treatment for the original injury, Hogenson's claim is not based only on the original injury and its effects, but upon subsequent interference in his right to medical treatment.

Although Hogenson filed his claim at a time when he did not have evidence of this influence, he contends that he now has such evidence. We find no evidence in the record that the employer controverted this claim. We therefore agree that the board properly did not dismiss this claim for failure to file a request for hearing.[99]

6. Conclusion.

We hold that denial and dismissal of a particular claim under AS 23.30.110(c), after the dilatory party is provided notice and the opportunity to present evidence and argue against dismissal of the claim, precludes later relitigation of a claim for the *same* benefit, arising from the *same* injurious accident, against the *same* employer, based on the *same* theory (nature) of injury. We have found that the board had substantial evidence to support its finding that the employer failed to controvert the employee's 2002 claim. We agree that to the extent the employee's 2002 claim presents claims for different benefits than those claimed in the employee's denied and dismissed 2001 claim, the board correctly denied the employer's petition to dismiss.

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[98] This is clearly a different nature of injury than that previously claimed, which was that he struck his head on a conduit, as well as a different form of relief. *Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069, 26 (Feb. 7, 2008). What impact removing his physician's opinion would have on his case is not entirely clear.

[99] Whether the board may "remove" an opinion, or award compensation based on the remaining evidence if the opinion is "removed," was not a question before the board. We do not decide here whether such a claim is viable under AS 23.30.

We AFFIRM the board's decision, we MODIFY paragraph 2 of the board's order to delete "and continuing," and we REMAND the case to the board with directions to proceed in light of this decision.

Date: *28 February 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. This is a final decision on Norman Hogenson's 2000 and 2001 workers' compensation claims, because the commission AFFIRMED the board's decision denying and dismissing those claims. This decision is NOT a final decision on Norman Hogenson's Workers' Compensation Claim filed on June 25, 2002. The commission's decision AFFIRMS (approves) Alaska Workers' Compensation Board Decision No. 07-0118, modifies the board's order, and returns the case to the board to hear Mr. Hogenson's 2002 claim and make a decision on it.

This decision becomes effective when the commission mails or otherwise serves this decision to the parties, unless proceedings to reconsider it or seek Alaska Supreme Court review are instituted (started). To see the date of mailing or other distribution, look at the certificate of distribution in the box on the last page.

Effective November 7, 2005, proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. However, because this is not a final administrative agency decision on the workers' compensation claim, the Supreme Court may decide not to accept an appeal. Other forms of review may be available under the Alaska Rules of Appellate Procedure. A petition for review or hearing must be instituted in the Alaska Supreme Court within 10 days after this decision is mailed or otherwise distributed.

If you wish to seek review by the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the Commission within 30 days after delivery or mailing of this decision.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, *if appeal is available*, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed, whichever is earlier.

CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 074, the final decision and order in the appeal of University of Alaska Fairbanks v. Norman E. Hogenson, AWCAC Appeal No. 07-023; filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *28th* day of *February*, 200*8*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision issued in AWCAC Appeal No. 07-023 was mailed on *2/28/08* to Norman Hogenson (certified) & Constance Cates Ringstad at their addresses of record and faxed to Ringstad, Director WCD, AWCB-Fbx & AWCB Appeals Clerk.

Signed *2/28/08*
L. Beard, Appeals Commission Clerk Date